BRIEF FOR PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

No. 291.

ENGELBERT MEYER, PLAINTIFF IN ERROR,

versus

THE CITY OF RICHMOND AND THE CHESAPEAKE & OHIO RAILWAY COMPANY,
DEFENDANTS IN ERROR.

IN ERROR TO SUPREME COURT OF APPEALS OF VIRGINIA.

The Case Stated.

This was a common law action of trespass on the case, instituted by the plaintiff in error, in one of the *nisi prius* courts of the city of Richmond, in the State of Virginia, to recover damages of the defendants in error by reason of their interferance with the free use of a street in front of the plaintiff's real property, in that the first named defendant attempted to authorize, and the last named defendant took and appropriated to its own use, without process of law or condemnation, the said street, thereby materially damaging the property of the plaintiff in error. The plaintiff in error is and was at

the time of his suit, the owner in fee of a lot of land fronting on Eighth street, between Cary and Canal streets, in the city of Richmond, Virginia, as shown by the plat filed with the record, on which were located two brick buildings, the first floors of which were used for store purposes, and the second stories as dwellings. Previous to the obstruction of Eighth street, as hereinafter described, the said property was very profitable as an investment, having been for many years continuously rented to good tenants, who promptly paid remunerative rents for same. But the City Council of Richmond, on the 26th day of June 1886, by ordinance (a copy of which appears on pages 17-19 of record) authorized the Richmond & Alleghany Railway Company to obstruct for a distance of sixty feet (commencing at Canal street, running in the direction of Cary street) Eighth street, and by virtue of which said company wholly obstructed and occupied said street, from side to side, for said distance, with its tracks, sheds, fences, etc., except to pedestrians, for whom said company provided, as required by the ordinance, an overhead bridge, with stairway approaches thereto. By means of these obstructions, so made by said company under the authority of the city, travel along the said street in front of the property of the plaintiff was not only interfered with, but practically arrested, and his property not only substantially injured, but, in effect, destroyed. While the ordinance referred to authorized the Richmond & Alleghany Railway Company to make and maintain the said obstructions, yet all the rights, privileges and obligations of said Richmond & Alleghany Railway Company had been, at the beginning of the suit, legally transferred to and assumed by the defendant in error, the Chesapeake & Ohio Railway Company, and that said last mentioned company continued and maintained the said obstructions.

The declaration, found on pages 14-17 of the record, fully sets forth in three separate counts the title and estate

of the plaintiff in error to the property alleged to be damaged, the nature of the trespasses committed by the defendants and the circumstances under which the same were done, and the nature and amount of the damages suffered by the plaintiff. With the declaration profert was made of the act of the General Assembly of Virginia by which the city of Richmond was incorporated; while the ordinance of the legislative body of the city authorizing the closing of the street and also a plot, showing the *locus in quo*, were filed to be considered as a part of the declaration. Thereupon the said defendants filed a demurrer to the said declaration and to each count, in which the plaintiff joined, thereby putting in issue the question whether the city could, by said ordinance, constitutionally and legally authorize the closing of said street, and thereby practically take the plaintiff's property under an ordinance which made no provision for any process of law against the plaintiff, or for the condemnation of his property. The court sustained the demurrer and dismissed the plaintiff's action, and in order more clearly to put on the record the grounds on which the plaintiff insisted on his right of recovery, he filed a bill of exception, which is found on pages 20-1 of record and is as follows:

"Be it remembered that this day, after the court had overruled the motion of the plaintiff submitted to the court on the 27th day of December, 1895, to set aside its judgment then entered on the demurrer, the plaintiff again moved the court to set aside and annul said judgment solely on the ground that the act of the General Assembly of Virginia, approved May 24th 1870, providing a charter for the City of Richmond (Acts 1869-'70, p. 120), so far as it authorized the passage of the ordinance in the declaration mentioned, as well as said ordinance, is unconstitutional and void, because in conflict with the fourteenth amendment of the Constitution of the United States, which prohibits any State from depriving any person of property without due process of law; but the court overruled said

motion and refused to set aside said judgment; to which ruling of the court the plaintiff excepted, and filed his bill of exception, which he prays may be signed, sealed and and enrolled, and made a part of the record, which is accordingly done.

E. C. MINOR, [Seal.]"

Thereupon, the plaintiff, in accordance with the statute in such cases provided, presented a petition to the Supreme Court of Appeals of Virginia, the court of the last resort of that State, asking a writ of error to said judgment, but said court refused the said writ, and on the 20th day of February, 1896, entered an order found on page 7, of record, in the language following:

"The petition of Engelbert Meyer, for a writ of error from a judgment rendered by the Law and Equity Court of the City of Richmond, on the 31st day of January, 1896, in a suit in which the petitioner was plaintiff, and the City of Richmond and the Chesapeake and Ohio Railway Company were defendants, having been maturely considered and the transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that said judgment is plainly right, doth reject said petition."

From that order the plaintiff in error applied for and obtained a writ of error to this honorable court.

On Question of Jurisdiction.

The ground on which the defendants sought to justify the closing of the street, which, it was admitted, caused the damage complained of in the declaration, was that sub-division VII, of section 19 of an act of the General Assembly of Virginia providing a charter for the city of Richmond (Acts 1869–'70, p. 120,) authorized the City Council to pass oridinances *ad libitum* closing the streets of the city, and that by virtue of this power the Council had authorized the railroad to do what had been done in the premises.

The section of the charter relied on is in the language following:

"19. The City Council shall have, subject to the provisions herein contained, the control and management of the fiscal and municipal affairs of the city, and of all property, real and personal, belonging to the said city; and may make such ordinances, orders, and by-laws, relating to the same, as it shall deem proper and necessary. They shall likewise have the power to make such ordinances, by-laws, orders, and regulations as they may deem desirable to carry out the following powers, which are hereby vested in them:

* * * * * * *

VII. To close or extend, widen or narrow, lay out and graduate, pave and otherwise improve, streets and public alleys in the city, and have them properly lighted and kept in good order; and they shall have over any street or alley in the city, which has been or may be ceded to the city, like authority as over other streets or alleys. They may build bridges in, and culverts under, said streets; and may prevent or remove any structure, obstruction, or encroachment over, or under, or in a street or alley, or any sidewalk thereof, and may have shade trees planted along said streets; and no company shall occupy with its works the streets of the city, without the consent of the Council. In the meantime, no order shall be made and no injunction shall be awarded, by any court or judge, to stay the proceedings of the city in the prosecution of their works, unless it be manifest that they, their officers, agents or servants, are transcending the authority given them by this act and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages."

By reference to the ordinance, made a part of the declaration, under the authority of which the railroad claimed the right to close the street, it will be seen that no sort of provision was made for the ascertainment of damages in

favor of persons whose property was affected by the proposed act. Hence the demurrer raised the question as to whether the said ordinance and likewise the charter of the city, made a part of the declaration, were in violation of the Constitution, and laws of the United States, made in pursuance thereof, But, to make assurance doubly sure, the plaintiff in error moved the trial court to reverse and annul its order dismissing the suit "solely on the ground that the act of the General Assembly of Virginia, approved May 24th, 1870, providing a charter for the city of Richmond, so far as it authorized the passage of the ordinance in the declaration mentioned, as well as said ordinance, is unconstitutional and void because in conflict with the fourteenth amendment to the Constitution of the United States, which prohibits any State from depriving any person of property without due process of law." This not only appears from the bill of exception above quoted, but from the order of the court found on page 20 of the record, which is in the following language:

"And at another day, to-wit: at a law and equity court held for the city of Richmond on the 31st day of January, 1896:

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City of Richmond and Chesapeake & Ohio Railway Company,
Defendants. } Order.

"This day came the parties again, by their attorneys, and the court, being now advised of its judgment to be rendered herein, on the motion of the plaintiff to set aside the judgment rendered on the demurrer to the plaintiff's declaration and to each count thereof, doth refuse to set aside said judgment.

"And thereupon the plaintiff again moved the court to set aside said judgment entered on the 27th day of December, 1895, sustaining defendant's demurrer to the declaration, and to each count thereof, solely on the

ground that the act of the General Assembly of Virginia, approved May 24th, 1870, providing a charter for the city Richmond (Acts 1869–70, p. 120), so far as it authorized the passage of the ordinance in the declaration mentioned, as well as said ordinance, is unconstitutional and void, because in the conflict with the fourteenth amendment to the Constitution of the United States, which prohibits any State from depriving any person of property without due process of law, and therefore there was no warrant of law for the closing of said street as claimed by said defendants; but the court overruled said motion and refused to grant said motion and to set aside said judgment; to which action of the court the plaintiff excepted and filed his bill of exception, which was signed, sealed and enrolled, and made a part of the record."

The same question was presented to the Supreme Court of Appeals of Virginia, as appears from the following quotations found on pp. 8 and 9 of record:

"Your petitioner now insists that the said Law and Equity Court erred in *sustaining said demurrer to his declaration, and also in refusing to set aside its judgment in so holding as set forth in his bill of exception.*

"Your petitioner therefore humbly submits:

"That under the constitution and laws of this State the free and uninterrupted use of public highways once dedicated to and accepted by the public, or acquired by right of eminent domain, are for continuous public use, and that the right of access to and use of such streets by an abutting property holder *is property of which the owner cannot under the Federal Constitution be deprived without due process of law.*"

"The said Law and Equity Court, in sustaining the said demurrer, denied to your petitioner his constitutional rights, and specially so did in refusing to set aside its judgment when its attention was called to the unconstitutionality of the act of the General Assembly of Virginia, approved May 24th, 1870 (Acts 1869–'70, p. 120), so far as

it authorized the passage of the ordinance in the declaration mentioned, because in conflict with the fourteenth amendment, which prohibits any State from depriving any person of property without due process of law, there being no mode prescribed in the said act of the General Assembly or in said ordinance for the divesting him of his said property rights by any judicial proceeding whatsoever."

We have been thus specific in our statement of the pleadings in this case, in order to show how completely they correspond with the procedure in the recent case of *Railway Co.*, v. *Chicago*, 166 U. S., 226, 231, where Mr. Justice Harlan states the condition of a similar record which he thought necessarily presented a Federal question. He said: "It is sufficient if it appears from the record that such right was specially set up or claimed in the State Court in such manner as to bring it to the attention of that court."

"Now, the right in question was distinctly asserted by the defendant in its written motion to set aside the verdict and grant a new trial. Among the grounds for a new trial were the following: That the several rulings of the court in excluding proper evidence for the defendant, the statute under which the proceedings for condemnation were instituted, and the verdict of the jury and the judgment based upon it, were all contrary to the fourteenth amendment declaring that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its limits the equal protection of its laws.

"When the trial court overruled the motion for a new trial and entered judgment, it necessarily held adversely to these claims of Federal right.

"But this is not all. In the assignment of errors filed by the defendant in the Supreme Court of Illinois, these claims of rights under the Constitution of the United States were distinctly reasserted.

"It is true that the Supreme Court of Illinois did not in its opinion expressly refer to the Constitution of the United States. But that circumstance is not conclusive against the jurisdiction of this court to re-examine the final judgment of the State Court. The judgment of affirmance necessarily denied the Federal rights thus specially set up by the defendant; for that judgment could not have been rendered without deciding adversely to such claims of right. Those claims went to the very foundation of the whole proceeding, so far as it related to the railroad company, and the legal effect of the judgment of the Supreme Court of the State was to deny them. 'The true and rational rule,' this court said in *Proprietors of Bridges* v. *Hoboken Land & Improvement Co.*, 68 U. S., 1 Wall., 116, 143, 'is that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution, or act of Congress, was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.' In *Roby* v. *Colehour*, 146 U. S., 153, 159, it was said that 'our jurisdiction, being invoked upon the ground that a right or immunity, specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right, so set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment.' *DeSaussure* v. *Gaillard*, 127 U. S., 216, 234; *Brown* v. *Atwell*, 92 U. S., 327; *Chicago L. Ins. Co.* v. *Needles*, 113 U. S., 574, 577; *Sayward* v. *Denny*, 158 U. S., 180, 183. There is, we conceive, no room to doubt that the legal effect of the judgment below was to declare that the rights asserted by the defendant under the national Constitution were not infringed by the proceedings in the case. Consequently, the motion to dismiss for want of jurisdiction must be overruled, and we proceed to examine upon its merits."

And at page 238, in the same opinion, it was said:

"In *Scott* v. *Toledo*, 36 Fed. Rep., 385, 395, 396, the

late Mr. Justice Jackson, while circuit judge, had occasion to consider this question. After full consideration, that able judge said: "Whatever may have been the power of the States on this subject prior to the adoption of the 14th amendment to the Constitution, it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the States cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner; and that any attempt to do so, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself, or under delegated authority by one of the subordinate agencies of the State, and whether done directly, by taking the property of one person and vesting it in another or the public, or indirectly through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that 'due process of law' required by said amendment. The conclusion of the court on this question is, that since the adoption of the 14th amendment, compensation for private property taken for public uses, constitutes an essential element in 'due process of law,' and that, without such compensation, the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the Federal Constitution.'"

And the residium of the many and voluminous discusssions of this subject could not be better or more clearly stated, than is done by the learned Justice, on page 240.

"In his discussion as to the meaning and scope of the 14th amendment, the same writer, in his edition of Story on the Constitution, after observing that every species of individual property was subject to be appropriated for the special needs of either the State or National Government,

but that the power to appropriate was subject to the restriction, among others, that it must not be exercised without making due compensation for whatever is taken, says: 'Due process of law requires, first, the legislative act authorizing the appropriation, pointing out how it may be made and how the compensation shall be assessed; and, secondly, that the parties or officers proceeding to make the appropriation shall keep within the authority conferred, and observe every regulation which the act makes for the protection or in the interest of the property owner, except as he may see fit voluntarily to waive them.' 2 Story Const., § 1956.

"In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State, or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the state, is a denial by that State of a right secured to the owner by that instrument."

In the case at bar, as before remarked, the ordinance authorizing the taking of the plaintiff's property made no provision whatever for the assessment of damages, or other proceedings looking to a condemnation. This court has frequently held that a hearing is essential to due process of law. On this point it is sufficient to refer to the leading case of *Davidson* v. *New Orleans*, 96 U. S., 97, approved in the recent case of *Fallbrook I. Dist.* v. *Bradley*, 164 U. S., 112.

Inasmuch as the act complained of was sought to be justified by ordinance of the city of Richmond, it is appropriate to conclude the discussion of the question of jurisdiction with the remark that by an unbroken line of decisions from *Weston* v. *City Council*, 2 Peters, 464, to the present time, this court has held that the acts done under the authority of a statute embrace all ordinances of

municipal corporations, as well as acts of State legislatures.

The precise question hereinafter to be discussed has never been presented to or determined by this court, so far as the reported cases show, and is now for the first time raised by the petition. But this court has never shown any disposition to permit municipal corporations to escape from their obligation growing out of their control over the streets, or to allow other corporations to appropriate to their own use private property without making just compensation.

In the case of *Salt Lake City* v. *Hillister*, 119 U. S., 260, it was said:

"But the argument is unsound that whatever is done by a corporation in excess of the corporate powers, as defined by its charter, is as though it was not done at all. A railroad company authorized to acquire a right of way by such exercise of the right of eminent domain as the law prescribes, which undertakes to and does seize upon and invade, by its officers and servants, the land of a citizen, makes no compensation, and takes no steps for the appropriation of it, is a naked trespasser, and can be made responsible for the tort. It has no authority to take the man's land, or to invade his premises. But if the governing board had directed the act, the corporation could be sued for the tort, in action of ejectment, or in trespass, or an implied assumpsit for the value of the land. A plea of *ultra vires*, in this case, would be no defence."

And the Supreme Court of Virginia has been equally emphatic in regard to the rights of abutting owners in highways, and the encroachment thereon by persons or corporations. See *West. U. Tel. Co.* v. *Williams*, 86 Va., 696; *Hodges* v. *Railroad Co.*, 88 Va., 653, and *Chamberlaine* v. *Norfolk City*, 29 Gratt., 53.

In this last case, Christian, J., said: "The City Council having no authority to grant permission to Chamberlaine to extend the steps of his building into the public street, and an ordinance specially forbidding it, such an exten-

sion was an unauthorized obstruction of a public highway, and a nuisance which the corporate authorities had a right to abate."

On the Merits of the Case.

We mantain on behalf of the plaintiff in error this proposition:

That under the Constitution and laws of the State of Virginia, the free and uninterrupted use of highways, once dedicated to and accepted by the public, or acquired by right of eminent domain, are for continuous public use, and that, when relying upon that fact, important public and private property rights have been acquired, the highway cannot be permanently diverted to a private use without proper compensation being made to those injured, and as a consequence, any person or persons so diverting such highway, are trespassers and liable in damages to the parties injured.

In this general proposition several minor propositions are involved:

(*a*) A highway once lawfully established is for continuous public use as such. Tiedman on Municipal Cor., sec. 301. "Once a highway always a highway" is a maxim of the common law, and not even the Legislature can take away such right without compensation. Elliott on Roads and Streets, sec., 658; *Taylor's Case*, 29th Gratt., 793; *Bunting* v. *Danville*, 93 Va., 200.

This doctrine is expressly recognized in *Story* vs. *N. Y. Elevated R. R. Co.*, 90 N. Y., 122, where the court, at page 178–9, said:

"The ownership of such an easement is an interest in real estate, constituting property, within the meaning of that term as used in the Constitution of the State, and requires compensation to be made therefor, before it can be lawfully taken for a public use."

In another, and perhaps the most celebrated and ably

argued case ever before the Court of Appeals of New York, it was said:

"An abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property, which belong to him by reason of its location, and are not enjoyed by the general public, such as the right to free access to his premises. * * *

"These rights are not only valuable to him for sanitary purposes, but are indispensable to the proper and beneficial enjoyment of his property, and are legitimate subjects of estimate by the public authorities in raising the fund necessary to defray the cost of constructing the street. He is therefore compelled to pay for them at their full value, and if in the next instance they may, by legislative authority, be taken away and diverted to inconsistent uses, a system has been inaugurated which resembles more nearly legalized robbery than any other form of acquiring property.

"Any law which destroys property, or *its value, or takes away any of its essential attributes, deprives the owner of his property.*" *Lahr.* v. *Met. Elevated Railway Co.*, 104 N. Y., 286.

(*b*) The owner of land abutting on a street has other rights peculiar to himself which rest upon the relation of his lot to the street, coupled with the further and equally important fact that, by virtue of his ownership of that lot, he is charged with his private share of the expense of improving, and maintaing the street in a condition for public use. *These rights, which are necessary to the proper enjoyment of his property, are as much property as the land which he owns, and equally within the protection of the Constitution and laws.*" Tideman on Municipal Cor., sec. 301. See also Dillon on Mun. Cor., sec. 587b and 587c.

"This (the easement of access) is so far regarded as private property that not even the Legislature can take away and deprive the owner of it without compensation." Elliott on Roads and Streets, 526.

(*c.*) "Any person or corporation diverting the highway from its proper use disturbs the right of property and is a trespasser, and must answer in damages at the suit of the owner." Elliott on Roads and Streets, sec. 536, and *Elizabeth, Lex. and Beg. S. R. R.* v. *Combs*, 10 Bush., 382.

In this last case, it was said by the Supreme Court of Kentucky that "if an appropriation of a street, even by legislative and municipal sanction, unreasonably abridges the right of adjacent owners to the use of a street as a means of ingress and egress, they are thereby deprived of a property right without compensation, and an action will lie against the person or corporation guilty of usurping such unreasonable and exclusive use for the recovery of such immediate and direct damages as the owner may sustain."

A plot filed with the declaration and made a part of it, shows the *locus in quo*, and that the plaintiff's lot is located on the west side of Eighth street, about the centre of the square, between Cary and Canal streets, and that the obstructions at a distance of twenty-three (23) feet from his lot, occupied about sixty feet from side to side of Eighth street between said lot and Canal street, thus completely cutting plaintiff off from ingress to, and egress from Canal street along Eighth street.

It is not denied, but freely admitted, that one of the essential elements of his right to recover in an action of this nature, is the fact that the plaintiff has suffered some *special damage* to his property by the obstruction placed in the highway.

In 1 Addison on Torts, Sec. 279, it is stated that "no one can have an action for a nuisance or obstruction in a common highway without assigning some particular damage to himself individually, independent of the general inconvenience to himself as one of the public, and the expense of removing the obstruction is not such damage." See also Cooley on Torts, 618, discussing what is special injury entitling a party to redress.

The ancient way of stating the principle is this: "without special grief shown by the plaintiff, the action lies not, but is punishable by the leet," *Fincux* v. *Horenden*, Cro. Eliz., 664.

The cases recognizing the elementary principle are multitudinous, and need not be cited here. Many of them are collected in notes six and seven, on page 500 of Elliott on Roads and Streets.

The declaration, after alleging the ownership of the lot described, alleges that the defendants had unlawfully obstructed Eighth street, placing "divers fences and other structures across the said highway at a point two hundred and fifty feet south of Cary street, and 60 feet north of the fence of the old Canal, which fences and other said structures obstructed and closed the said highway and prevented the plaintiff, his tenants, agents, servants and others from having the free use of said highway as he and they might otherwise have had, and by means of the premises, the plaintiff has, also from thence hitherto, been deprived of the use of his said store and dwelling upon said messuage, and of large gains, profits, benefits and advantages in the way of rent, which he might, and otherwise would, have acquired from said store and dwelling, to-wit: the sum of fifteen hundred dollars, and by means whereof the value of said property has been and is diminished, to a great extent, to-wit: the sum of two thousand dollars, and thereby the plaintiff has been and still is greatly annoyed and incommoded in the renting, use and enjoyment of said messuage and premises."

On the demurrer, this broad and sweeping statement of the *special damages*, as set forth in the first count, must be taken as true. The statement in the second count of special damage is equally as comprehensive, and in the third count, the plaintiff alleges that by means of the obstructions he was "deprived of the free use of said street and highway, by means of which he was greatly hindered and damaged in the use and enjoyment of his messuage

and premises, and deprived of large gains and advantages which he might have otherwise acquired by the renting of his said store and dwelling," and in addition to the special damages claimed in the first count, claims "the sum of two hundred dollars in and about finding a tenant to occupy said store and dwelling, and also laid out and expended the sum of one hundred dollars in and about preserving the property from depredations while so unoccupied."

It is submitted with the greatest confidence that these statements of *special damage* fully meet the requirement of the principle above stated. They clearly differentiate the damages specified from that of a "general inconvenience to himself as one of the public."

Some of the courts, in seeking to find some inflexible rule by which to determine what are *general* and what *special* damages, have undertaken to draw a hard and fast line between them by making every case turn upon the physical fact as to the *location* of the obstruction, with reference to the property injured, holding that the property *must necessarily abut the obstruction.* But we submit that such is not the determination in the best considered cases.

Of the English cases, on this precise point, the one that is spoken of as the leading case is *Wilkes* v. *Hungerford Market*, 2 Bing. N. C. 281, more fully reported in 2 Scott, 446 (decided in 1835). The plaintiff, a book-seller, having a shop by the side of a public thoroughfare, Craven street, suffered in his business in consequence of passengers having been diverted from the thoroughfare by an unauthorized obstruction across it for a unreasonable time. After verdict for the plaintiff for £30, the question was carefully argued on a motion for a non-suit, and all the cases from the Year books down were carefully examined and the action sustained. The injury to the general public was that they could not walk in the same track as before, and for that cause alone a private action would not lie, but

the *special injury* to this plaintiff was the *loss of trade*, which, but for the obstruction, he would have enjoyed, and for that an action was held to lie.

Senior v. *The Metropolitan Railway Company*, 2 H. & C. (1863) has a very important bearing on this subject. The plaintiff was a draper and tailor, occupying a shop on Hoy street, which he hired at a year's rental of £26. The defendant constructed their road across Warner street, nearly in front of the plaintiff's shop, which was about thirty yards from the railroad bridge on Warner street. The plaintiff claimed damages for the loss of his business by the obstruction to free travel, which before existed, and not at all for injury to the property *per se*, as he did not own it. A verdict for £60 for loss of business alone was sustained after full argument.

In *Benjamin* v. *Starr*, Law Rep., 9 C. P., 400 (1874), the plaintiff kept a coffee-house on Rose street, a narrow street near Covent Garden. The defendants had a place of business fronting on King street, but with a rear entrance on Rose street, close adjoining plaintiff's premises. The defendants kept their teams loading and unloading at their rear entrance so large a part of the time that the plaintiff was obliged to burn gas all day for light, and access to his shop was materially obstructed, and the stench arising from the horses was so offensive as to materially lessen the business and profits of the coffee-house; and while the general rule was fully recognized, it was held sufficient private damage, and a verdict for £75 was sustained.

In the case of *Baker* v. *Moore*, cited by Gould, J., in Ld. Raym., 491, the plaintiff sued the defendant for making obstruction across a highway, in consequence of which the plaintiff's tenants left his houses, and he thereby lost the profits of them. It was objected for the defendant that the damage was not special enough, but the court was of a different opinion.

The case of *Ireson* v. *Moore* (1 Ld. Raym., 495), is

spoken of in *Fritz* v. *Hobson*, L. R., 14 Chy. Div., 542, as a case of great authority, and is said to be reported in numerous books, and is cited in Comyn's Digest, 5th Ed. Vol. 1, p. 279. It was this: "If A has a colliery, and B stops up a highway near it, whereby nothing can pass to such colliery, an action upon the case lies, for he ought to be remedied in particular, though it was a highway for all." See also *Cook* v. *Mayor*, L. R., 6 Eq., 176.

The American cases are equally as explicit and strong to sustain our contention.

In the case of *Stetson* v. *Flaxson*, 19 Pick., 147, spoken of frequently as the leading case, was where the defendant, having erected a ware-house projecting several feet into the street and beyond the plaintiff's ware-house, standing near the line of the street, whereby the plaintiff's ware-house was obstructed from the view of passengers, and travel was directed to a distance from it, and in consequence it was rendered less eligible as a place of business, and the plaintiff was obliged to reduce the rent, it was held that the plaintiff had suffered a special damage from the public nuisance, which entitled him to an action against the defendant. In regard to the necessity of an averment of special damage, Putnam, J., in delivering the opinion of the court, says (p. 161): "The citizens of Boston who want a mere right of passage from Market Square to the sea, may pass through North Market street, as well as they could through the old way which was obstructed. *They have no lands or ware-houses to be destroyed or greatly injured; they have no loss of rents from the desertion of tenants.* They at most are obliged to travel in a new street near to the old one, and probably do not desire to have the old one reopened; at most, they could complain only of what is technically a common nuisance, by which they experience only an inconvenience common to all citizens. But what to them, is at most, a mere common inconvenience, is a thing which, *in respect to the plaintiff, essentially impairs the value of his estate.*"

The case of *Rigney* v. *City of Chicago*, 102 Ill., 64, was an action on the case instituted by appellant against appellee for the purpose of recovering damages alleged to have been sustained by the appellant by reason of the construction, by the city, of a viaduct or bridge along Halsted and across Kinzie streets at their intersection some two hundred and twenty feet west of the appellants' premises, fronting on Kenzie street, which cut off all communication with Halstead street, by way of Kenzie street, except by means of a pair of stairs at the intersection of these streets. It was held, that the city was liable to the appellant in damages for the injury.

Mr. Chief Justice Dickey, in delivering his opinion, said: "It is not every change of grade made in a street which may in effect impair the value of the lot in its vicinity, which is a violation of the right of the proprietor thereof. Such changes in the street, as it may reasonably be supposed, might be made for the improvement of the public highway, the purchaser of a lot upon a street must be assumed to have consented to when the purchase was made. The making of such change is, therefore, no invasion of his right in that regard. But it cannot be assumed that the purchaser gave assent to sudden and extraordinary changes in the grade of a public highway, such as it is unreasonable to suppose a purchaser at the time of the original sale, or when he made improvements, would naturally anticipate might be required for the improvement of the public highway. To make such changes is an invasion of the right of the lot owner is the exercise of a power beyond this right in the nature of an easement spoken of, *and if the value of the property is really and in fact impaired thereby, in such case the injury to the lot owner is, in my judgment, a damage, which under our constitution, must be compensated.*

"The improvement in the case at bar is, in my judgment, one of those extraordinary changes which cannot be lawfully made without just compensation to those who

suffer damage by reason of the structure. *The right of action does not depend upon the distance between the lot and the improvement. This depends upon the nature and character of the improvement and upon the question whether the property of the claimant is materially damaged in fact.*" This case has been since approved in *City of Joilet* v. *Blower*, 155, Ill., 416, and by this honorable court in *Chicago* v. *Taylor*, 125 U. S., at page 168, where its doctrine is recognized as correct.

In the case of *Sheedy* v. *Union Press Brick Works*, 25 Mo. App., 527, the plaintiff was the owner of a lot fronting westwardly on Grove street, in the city of St. Louis; the defendant was a corporation, engaged in the manufacture of brick, and its property lay immediately to the south of and adjoining the lot of the plaintiff; upon its property the defendant had erected its works. Prior to the commencement of the action, the defendant had erected and maintained a shed for its purposes, which did not stop at the eastern margin of Grove street, but was extended entirely across that street, so as to totally obstruct any egress for wheeled vehicles southward from the plaintiff's lot on that street, though the evidence tended to show that there was a foot way through the shed to the south. Grove street had been platted and dedicated to the public as far south as Witzer street.

The petition of the plaintiff contained two counts; the first demands damages for casting rain-water from the defendant's sheds upon his land; the second demands special damages for the injury he has sustained from the act of the defendant in obstructing Grove street to the south of the plaintiff's property. Thompson, J., delivering the opinion of the court, says:

"The second count states a good cause of action. A land owner, having a right of egress in a given direction, by way of a public street, may have an injunction to restrain the closing of the street, on the theory that, by being driven to take a circuitous route to reach a place or

object in that direction, he suffered what the law terms special damage.

"If he may have an injunction to restrain such an injury when threatened merely, he may, by parity of reasoning, maintain an action for special damages in consequence of the injury after it has been committed."

But because the plaintiff offered no evidence tending to show that his property had been depreciated in value by this obstruction, the judgment of the lower court was reversed and the cause remanded. See to same effect *Cummings* v. *St. Louis*, 90 Mo., 259.

In the State of Indiana, though, from some loose expressions found in some of the decisions, it would appear, that a different rule prevails, the doctrine is the same as in Illinois, as appears from the latest deliverance of the Supreme Court of that State. The first of these is *Penn. Co.* vs. *Stanley*, 10 Ind. Ap., 421, 425, (decided in April, 1894,) where it was held that where a railroad company so changed its grade as to cut off one entrance to an alley, which afforded one of the means of egress from and access to lots abutting on such alley, and thereby caused material diminution in the value of the lots, the lot owner could recover for such damage, even though the company was authorized to change the grade of a highway at a crossing of its road.

Gavin, J., in delivering the opinion, says: "We have here a lot, or several lots, one of the ordinary means of access to which was by the alley in question. This alley the appellant closed at one end, so as to cut off the entrance to it at that point, and thus the case presents a physical disturbance of the right to use the alley. This act necessarily and directly materially interfered with ordinary and usual means of access to the lots.

It is a matter of general knowledge that the alleys in the rear of town or city lots are usual means of reaching the lots for many purposes, and they ordinarily add to the value and convenience of the property. In this instance,

both the allegations and proof show a material diminution in the value of the lots by reason of the obstruction. *In order to authorize a recovery by the appellee, it is not necessary that the obstruction should have been immediately in front of or touching upon his real estate.*"

The other case is *Dantzer* v. *Ind. U. Railway Company*, 141 Ind., 604, (decided in December, 1894.) There the appellant claimed damages for the vacating of a part of a highway and a point two streets distance from his property; to which, even after such vacation of the said highway, he had access from streets both north and south of him—(his lot fronting east). The court, while affirming the judgment of the Circuit Court in favor of the appellee, used this language, directly applicable to the case which your petitioner presents. Hachnet, J., (p. 608):

"We think we may safely assert, however, that the obstruction of the easement of access need not always be upon the part of the lot whose owner is affected, but that if the obstruction, though remote, renders access to such lot impossible, or impairs it in a substantial manner, at the point where it abuts upon the street, the property right of the lot owner is invaded and he may recover. To illustrate this proposition, if a street were fully obstructed on either side of one's lot, so that the lines of the lot could not be reached, *access would be denied to the lot owner, though the street in front of his lot had upon it no obstruction.* The property rights of the lot owner, as against the public, are coterminus with the lines of his lot, but that property right may be obstructed, and its use defeated, by cutting off ingress and egress to and from such lines from points upon the street beyond such lines. In such case there should be, and is, a remedy. This conclusion is held in the case of *Pennsylvania Co.* v. *Stanley*, (Ind. App.), 10 Ind. Ap., 421, where the remote obstruction of an alley created a *cul de sac*, which it was necessary to enter to gain access to the plaintiff's abutting lot, but from which there was no exit."

In this case the obstruction was not on the same square with plaintiff's lot, so that he had access from each direction—was not placed in a *cul de sac*. It was therefore held that the complaint was *damnum absque injuria*.

In the case of *Eachus* v. *Los Angeles, etc., Ry. Co.*, 103 Cal., 614–617, Harrison, J., says: "The right of the owner of a city lot to the use of the street adjacent thereto is property which cannot be taken from him for public use without compensation, and any act by which this right is impaired is, to that extent, a damage to his property. When a city sub-divides a tract of land of which it is the owner into blocks and streets and sells the same, it thereby dedicates the streets to public use, and the purchaser of one of these lots acquires an easement in the street fronting upon his lot, and in which he has a right of property as fully as in the lot itself; and any subsequent act of the municipality by which the easement is destroyed or substantially impaired, for the benefit of the public, is a damage to the lot itself within the meaning of the constitutional provision for which he is entitled to compensation. Such easement is a right of property incident to the lot itself, and any damage sustained by the owner in its destruction or impairment is a damage peculiar to himself and independent of any damage sustained by the public generally."

The Supreme Court of Kentucky, in the case of *Railroad* v. *Applegate*, 8 Dona., 310, in a single sentence punctures the question to the quick and solves all doubt as to the law in that State, when it asserts that "if it should appear that such use was being made of a street as encroaches on any private right or *obstructs the reasonable use and enjoyment of the street* by any person who has an equal right to use it, we shall be ready to enjoin all such wrongful appropriation of the highway." See also *Bannon* v. *Murphy*, 38 N. W., 889.

And the cases all hold that where an injunction will lie to restrain such injury, an action will lie for special damages, special injury in equity as well as law being a necessary element.

It now becomes necessary to enquire into the real nature of the ordinance (found on page 17 of record) allowing Eighth street to be obstructed.

By the title of the ordinance, it at once appears that the closing of the street is authorized to be done by the Richmond and Alleghany Railroad Company, and by the first section it is provided that Eighth street, for a distance of about sixty feet next to Canal, should be closed, but, looking to the whole ordinance, all of which must be read to understand its scope, its real object appears, which was nothing more nor less than a covert effort to divert a *public street to a private use.* Fearing the discovery of the real purpose in view, and the resting of some such liability on the city as is here asserted, the Council provided, in section 4, that the Richmond & Alleghany Railroad Company should save the city harmless from all injuries or damages arising by reason of the exercise of the privileges granted said company, and obligated itself (the company) to pay to the city any amounts recovered against it on account of such injuries.

So far from the city having such power as is here attempted to exercise, it was, by its charter, *charged with the duty of preventing "the encumbering of streets, avenues, walks, public squares, lanes, alleys, bridges in ang manner whatever,"* (Sec. 19, Sub-div. VIII) and by sub-division VII, "to prevent or remove any structure, obstruction or encroachment over or under or in a street or alley." While by the same sub-division, the Council could "close or extend, widen or narrow, lay out and graduate, pave and otherwise *improve streets and public alleys* in the city;" yet these powers were to be exercised for the *public good*—not for the advantage of persons or corporations, and also subject to section 22 of the charter hereinafter quoted, and the like constitutional limitations, that private property was not to be taken for public use without just compensation.

Mr. Elliott, in his work on Roads and Streets, says:

"Public highways belong from side to side and end to end, to the public, and any permanent structure, or purpresture which materially encroaches upon a public street and impedes travel, is a nuisance *per se*, and may be abated, notwithstanding space is left for the passage of the public. For it is well settled that 'the public are entitled not only to a free passage along the highway, but to a free passage along any portion of it, not in the actual use of some other traveler,' and if this be true, it necessarily follows that there can be no rightful, permanent use of the way for private purposes."

In the case of *Green* v. *Numenacher* 36 Wis., 50, 56, Cole J., said: "It is further objected that the nuisance complained of is a common nuisance, and that the remedy for its abatement is by indictment or information by the State and not by private action brought by an individual. The law is, doubtless, well settled, that an action will not lie by an individual for the abatement of a common nuisance, unless special damage is alleged and proven by the party bringing such action. But when the aggrieved party suffers actual damage, which is peculiar to himself, and not such as he suffers in common with the public at large, then the law gives him a right of action for his own and particular injury. This rule is believed to be so elementary as to require no argument nor the citation of authorities in its support."

In the case of *Francis* v. *Shæll*, 53 N. Y., 152, Grove J., said: "The rule is, that one erecting or maintaining a common nuisance is not liable to an action at the suit of one who has sustained no damage therefrom, except such as is common to the entire community, yet he is liable at the suit of one who has sustained damage peculiar to himself."

In *Lansing* v. *Smith*, 4 Wend., 25, the court said: "The opinion I have found on this point is that every individual who receives actual damages from a nuisance may maintain a private suit for his own injury, although there may be many others in the same situation."

In *Sheppard* v. *Barnett*, 52 Tex. 638, the petition showed a nuisance in obstruction of the highway, and it was held that the plaintiff had suffered special damages therein different from that which is common to the public.

Mr. Elliott cites many cases to sustain this view, and sums up the doctrine as follows: "As a general rule no person can maintain an action for damages from a common nuisance where the injury and damages are common to all. But if a person sustains a special damage peculiar to himself from the obstruction of a highway, whether it be to his person or his property, he may maintain an action therefor. Thus, obstructing and cutting off access to a person's place of business is a special injury for which he may recover damages in action at law."

(Elliott on Roads and Streets, p. 500-501.)

The argument to show that the damage complained of in the declaration was peculiar to the plaintiff need not be repeated. The court will remember the charges in the declaration, and is asked to consider them in connection with the following pertinent quotation of a distinguished law writer:

"Thus, in the case of an injury from the erection of a building in a highway, a declaration simply alleging that the defendant had erected a building in a highway, whereby the defendant was prevented from passing with his horses and carriages or on foot, would be insufficient, for all the public are equally prevented from passing, and no recovery can be had for the common injury; but, if by reason of the obstruction, the plaintiff is prevented from reaching his premises, or if access thereto is cut off or made difficult, or if customers are prevented from coming to his shop to trade or to his inn for refreshments; or if he is compelled to take a more circuitous route to reach his destination, and thereby sustains material damage, as by the loss of time, or being subjected to loss in the sale of his goods, or in being prevented from performing a contract or discharging a legal duty, the special injury should be spe-

cifically and clearly set forth in the declaration, and must in the main, be established by proof on the trial or no recovery can be had. In an action arising from a public nuisance, the gravamen of the action is the special damage; but, in the case of a private nuisance purely, the fact of the nuisance appearing, all damages that are the natural and probable consequence thereof to a particular right can be reviewed, whether specially alleged in the declaration or not." Wood on Nuisances, § 830, p. 873. See *Brown* v. *Watson*, 103 Miss., 161; 6 Johnson Chy., 439.

In the case of *Bently* v. *City of Atlanta*, 92 Ga., 623, "the plaintiff had leased a house and lot in the city of Atlanta. Near to and adjoining the street upon which his lot abutted there was a bridge over the tracks of a railroad company, which, prior to January 2, 1892, was a safe and convenient highway. But some time in January the city wrongfully permitted the railroad to raise the bridge in the middle thereof five feet. This raising of the grade rendered passage over the bridge both difficult and dangerous; and for loaded wagons and other vehicles, it was almost impassable; travel was diverted, in consequence of which the plaintiff claimed special and peculiar damage. Simmons, J., in delivering the opinion of the court, said: "The duty, both with respect to the general public and the occupants of premises along the streets of a city, of keeping the streets free from permanent or long-continued nuisances, rests primarily on the municipal government; and this duty cannot be evaded by urging the right and duty of a railway company to bridge its line at street crossing, and maintain the bridges and crossings in proper condition. If the city authorities suffer a railway company to erect a bridge at a street crossing, and maintain it, together with the approaches thereto, in such manner as to render the same a public nuisance, the city is liable for the consequences, just as it would be if the improper work had been done by the city itself."

But, suppose for the sake of the argument, that the

railroad company was authorized by legislative grant to close and obstruct Eighth street, yet, on well understood principles, that would not exempt it from liability to private citizens for damages occasioned thereby. This court has spoken very clearly on this subject in the great case *Balt. & Pot. R. R. Co.* v. *Fifth B. Ch.*, 108 U. S.. 317, 331. It was there said:

"Undoubtedly a railway over the public highways of the District, including the streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation.

"But the case at bar is not of that nature. It is a case of the use by the railroad company of its property in such an unreasonable way as to disturb and annoy the plaintiff in the occupation of its church to an extent rendering it uncomfortable as a place of worship. It admits, indeed, of grave doubt whether Congress could authorize the company to occupy and use any premises within the city limits, in a way which would subject others to physical discomfort and annoyance in the quiet use and enjoyment of their property, and at the same time exempt the company from the liability to suit for damages or compensation, to which individuals, acting without such authority, would be subject under like circumstances. Without expressing any opinion on this point, it is sufficient to observe that such authority would not justify an invasion of others property, to an extent which would amount to an entire deprivation of its use and enjoyment, without compensation to the owner. Nor could such authority be invoked to justify

acts, creating physical discomfort and annoyance to others in the use and enjoyment of their property, to a less extent than entire deprivation, if different places from those occupied could be used by the corporation for its purposes, without causing such discomfort and annoyance.

"The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the State; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."

This citation, from this able and unanimous opinion, as well as others which might be made, shows that the line of demarkation, between the direct taking and appropriation of private property and its indirect taking by the destruction of its value, cannot be traced, or if it can be, it is of no sort of importance to do so. Both alike are under the band of the constitutional inhibition.

A quotation from the case of *Mahon* v. *N. Y. Central R. R. Co.*, 24 N. Y., 660, shows how the two conditions over-lap, and fortify and protect the rights of the citizen so fortuitously guaranteed by the Constitution.

"To construct a railroad in a public highway, without compensation to the adjoining owner, is the taking of private property for public use without lawful authority, and constitutes a nuisance—a perpetual nuisance—and every day's continuance of it is a legal wrong." See also *Keley* v. *Kansas City*, 69 Mo., 109; *Fortwool* v. *Crawford*, 8 A. & E. Cor. Cases, 406; and *Strange* v. *Dubuque*, 62 Ia., 303.

The practical effect of the ordinance was to make Eighth street from Cary south to the obstruction (on which plaintiff's lot abutted), a mere *cul de sac*. If it was legal to close Eighth street at its entrance into Canal, it was

equally legal to close it at its entrance into Cary, and thus deprive your petitioner of all access to his property, for there is no alley in the rear of his lot through which he could "eke out an inconvenient access with the outside world." Surely there was special injury to every one abutting on the *cul de sac* not common to others—the public in general.

It is pertinently said in *Johnston* v. *Old Colony R. R. Co.*, 28 R. I., 642, by the Supreme Court of Rhode Island, speaking on this exact point: "If a railroad can block up one side without liability for damage, why cannot another railroad block up the other side with equal exemption from liability, and thus leave a man's estate bottled or bagged up without paying damages? There can be no doubt that this lopping off of the approach to one's estate takes value from it; in fact, such approach is the very key of its value. If one pays his money directly for such approaches, as he does when he buys on a plat that he relies on, to be travelled over and make his estate central, why should a railroad appropriate such approaches and deprive him of the right of its becoming central without also paying for it? It is practically robbing one to enrich another, for, though a railroad corporation, so far as to entitle it to the right of eminent domain in its behalf, the shareholders are individuals, who are enriched by every such favor granted to it. It is common knowledge that the more centrally located an estate is the more value it is, and that ordinarily when an estate is removed by one single act and in a single day off of a much travelled way, and isolated and cooped up in a mere *cul de sac*, more or less value is thereby taken out of it. *Such damage in such a case as the one at bar does not seem to us indirect or remote, but direct and proximate. It is difficult to conceive what constitutes injury to an estate if lopping off its approaches which one has bought does not.*"

The italics are ours, and seem specially appropriate to this case.

In the court below, it was urged with earnestness that the cases relied on by the plaintiff in error and cited above, were largely, if not wholly, rendered in States where the constitutional inhibition was against the taking *or damaging* of private property without compensation.

We submit that the great and inalienable right of the citizen first secured by the Great Charter and now guaranteed in the Federal Constitution and in all the Constitutions of the States, is not to be "cabined, cribbed, confined, bound in to saucy doubts and fears" of its sufficiency to meet a case like this, because forsooth a few of the States have seen fit to head-off a disposition in some courts to curtail the scope of this beneficent provision. Surely this is no reason why other courts in other States should retrace their steps in the more beneficent construction wisely given this provision, but on the contrary these emendations show the true construction of the instrument.

But we are not left to mere argument as to the scope of this provision, as it stands in the Federal Constitution, and the Constitution of Virginia, for this court, in the oft-quoted case of *Pumpelly* v. *Green Bay Company*, 13 Wall., 166, 177, has used this language:

"The argument of the defendant is that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the goverment had a right to for the improvement of its navigation.

"It would be a very curious and unsatisfactory result if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators, and placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy

its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a constuction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law instead of the government, and make it an authority for the invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.

* * * * * * *

"But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell in his work on water-courses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken."

We very reasonably claim the same benefit in the case at bar, in view of the ruling of the Supreme Court of Appeals of Virginia, as this court accorded in that case in view of the ruling of the highest court of Wisconsin. In Virginia the principle set forth in the foregoing quotation has been expresely approved. See *Williams* v. *West. U. Tel. Co.*, 86 Va. 696, 704, and *Hodges* v. *S. & R. R. R. Co.*, 88 Va. 653, 654; *Indianapolis* v. *Hartley*, 67 Ill., 43; *Georgia* v. *Railroad*, 125 W. R., 259.

It is clear that the defendant in error cannot claim the exemption from liability recognized in *Transportation Co.* v. *Chicago*, 99 U. S. 635, for there the damage was occasioned by the act of the city in *improving its streets for public use.* That case and this are as far apart as the east from the west.

As the city cannot make improvement in *opening streets* without due regard to the constitutional requirement to make compensation for private property taken for

the purpose, so it cannot *close streets*, even with that end in view, without a similar responsibility. Much more, however, is the city responsible when it can be seen, as in this case, that the real object is to bestow a special privilege on a corporation at the expense of the public, resulting in special damage to private individuals.

On this precise point, we beg to call the court's attention to the language of the Supreme Court of Missouri in the case of *The Belcher S. Ref. Co.* v. *S. Louis G. Elev. Co.*, 82 Mo., 121, 127, where the city undertook to divert a public wharf (so by condemnation) to the use of a corporation for a period of twenty years. It was there said: "The city has no right, and can acquire none from the legislature to make such a disposition of the property condemned for wharf purposes as will prevent her, in the event it becomes necessary to extend and pave the wharf, from doing its duty in that respect. Laws which authorize the taking of private property for public use should be strictly construed and closely scrutinized. Nothing justifies such an invasion of private rights but an imperative public necessity and the exercise of this right of eminent domain, under color of which so many iniquities have been committed, should be held strictly within the bounds prescribed by the Constitution and the law.

It would not do to permit property condemned for one purpose to be used for another and different purpose, or property condemned for public use to be appropriated to private use. The latter can no more be done than could the property, in the first instance, have been condemned for such use. The authorities which support the foregoing propositions of law are numerous, but we will content ourselves with the citation of the following:

Imlay v. *Union Br. R. R. Co.*, 26 Conn., 255; *Williams* v. *Natural Bridge Plank Road Co.*, 21 Mo., 582; *Rutherford* v. *Taylor*, 38 Mo., 315; *Price* v. *Thompson*, 48 Mo., 363; *Ill. etc., Canal Co.* v. *St. Louis*, 2 Dillon, C. C., 82; *Pres. Society* v. *Auburn, etc., R. R. Co.*, 3

Hill 567; *Trenor* v. *Jackson*, 46 How., Pr. R., 397; *Louisville* v. *Louisville Rolling Mill Co.*, 3 Bush., 416; *Barclay* v. *Howell's Lessee*, 6 Pet., 498; *State* v. *Laverack*, 34 N. J. L., 202; *Warren* v. *Lyons City*, 22 Iowa, 357; *Board Education* v. *Edson*, 18 Ohio St., 225; *Barney* v. *Keokuk*, 94 S., 324."

At common law, depreciation of property by agencies that destroy its value, would undoubtedly be a ground for the recovery of damages. The maxim *sic utere tuo ut alienum non leadas*, embodies this duty that each owes the other. The law must enforce it, or the maxim would be idle. *West, A. R. Ry. Co.* v. *Hill*, 56 Penn. St., 460. Its application was made by the highest court in Virginia, in *R., F. & P. R. R. Co.* v. *City of Richmond*, 26 Gratt., 83, and on appeal, was affirmed in the Supreme Court, 96 U. S., 521.

But the Legislature did not leave this obligation to be discovered in the common law alone, for by section 22 of the charter of the city of Richmond, it is provided:

"22. The Council shall not take or use any private property for streets or other public purpose, without making to the owner or owners thereof just compensation for the same. But in all cases where the said city cannot by agreement obtain title to the ground necessary for such purposes, it shall be lawful for the said city to apply to and obtain from the Circuit or County Court of the county in which the land shall be situated, or to the proper court of the city having jurisdiction of such matters, if the subject lies within this city, for authority to condemn the same; which shall be applied for and proceeded with as provided by law."

It is an elementary principle that action for a trespass may be brought either against the hand actually committing the injury, or against the person or corporation by whose order or authority the act is done. (Addison on Torts, sec. 422). From which it follows, that both, as well as either, joint tort-feasor may be sued in the same action,

and to show liability on either, will entitle the plaintiff to recover against the one shown to be at fault. *Davis* v. *Franck*, 33 Gratt., 413.

In *Chalkley* v. *City of Richmond*, 88 Va., 402, it was said:

"The city of Richmond cannot escape liability for the damages done to the rights of property, health and comfort of the plaintiff, by the alteration made in the sewer by Stokes & Co., by permission of the city under the supervision of its agents and by its money aid. A person contributing to a tort, whether his fellow-contributors are men, natural or other forces or things, is responsible for the whole same as though he had done all without help."

For these reasons we submit that the judgment of the court below should be reversed, the demurrer to the declation overruled and the case remanded for trial.

HENRY R. POLLARD.

Reply Brief for Plaintiff in Error.

In the Supreme Court of the United States.

No. 291.

ENGELBERT MEYER, PLAINTIFF IN ERROR,

versus

THE CITY OF RICHMOND AND THE CHESAPEAKE & OHIO RAILWAY COMPANY,
DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

On behalf of the Plaintiff in Error, we beg to submit in reply to brief for defendants in error, the following:

FIRST. It cannot be true as contended that, in order to raise a Federal question, and thus secure jurisdiction here, the declaration should have alleged in terms the deprivation of the constitutional right now contended for.

In the multitude of cases in which this Court has had under review the question of jurisdiction, not a single case is cited, nor can one be cited, where it has been held that the plaintiff's bill or declaration must set forth as a

ground of relief the fact that he has been deprived of his property without compensation or without due process of law. The cases all say, as Mr. Justice Harlan said in *Railway Co.* vs. *Chicago*, 166 U. S., 226, 231: "It is sufficient if it appears from the record that such right was specially set up or claimed in the State court in such manner as to bring it to the attention of that court."

The declaration made the ordinance of the city, which deprived the plaintiff of his property, a part of it, so that the court could see for itself that no provision for compensation or for process before it did the act complained as a deprivation of his property. Whether such ordinance was amenable to the fourteenth amendment was a *conclusion of law*, and one of the cardinal, and even elementary, rules of pleading is that conclusions of law need never be pleaded.

The statement *ad arguendum* in the brief that the motion made on January 31st, relied on to give jusisdiction, "was an afterthought" is without the slightest foundation. Is it not more reasonable to presume that two motions to set aside the judgment were made, (one on the usual and general ground that it was contrary to the law and the evidence, and the other "solely on the ground that the Act of the General Assembly of Virginia, approved May 24th, 1870, providing a charter for the city of Richmond, so far as it authorised the passage of the ordinance in the declaration mentioned, as well as said ordinance, is unconstitutional and void because in conflict with the fourteenth amendment of the Constitution of the United States. Record p. 21), in order more pointedly to present the constitutional question? Not only did the trial Court pass on this last motion, but one of the errors assigned in the petition for appeal, presented to the Court of Appeals, expressly set out this ruling of the trial Court as error, for which its judgment should be reversed. See Record p. 8, 9.

The declaration, after alleging the ownership of the lot described, alleged that the defendants did, under the au-

thority of an ordinance, unlawfully close Eighth Street, and did unjustly and unlawfully allow the Richmond and Alleghany Railroad Company, of which the Chesapeake and Ohio Railway Company was the successor, to erect sheds and fences across said street, which obstructed the free use of the same as a highway, whereby the plaintiff was greatly damaged in having his property depreciated in value. The only answer to these damaging charges was a demurrer to the declaration, which of necessity presented the question whether the ordinance was a lawful and constitutional exercise of the powers vested in the Council, viz: whether such an ordinance which closed a street was valid without proper provision for process against the persons specially injured by the proposed act, and also without proving compensation for damages, etc.

There is excellent authority for the proposition that the construction of a railroad in a public street, without providing compensation to the persons injured thereby, is *ipso facto* the taking of private property for public use. *Mahon* vs. *N. Y. C. R. R. Co.*, 24 N. Y., 660; *Keley* vs. *Kansas City*, 69 Mo.; *Fortwood* vs. *Crawford*, 8 A. and E. Cor. Cases, 406; and *Strange* vs. *Dubuque*, 62 Ia., 303.

And this Court in *Balto. & Pot. R. R. Co.* vs. *Fifth St. Bap. Ch.*, 108 U. S., 317, 331, said:

"The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the State; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."

SECOND. The cases relied on to show that the presentation of the Federal question came too late in this case do not sustain the contention of counsel.

Bushnell vs. *C. M. & S. Co.*, 148 U. S., 682 holds that

"A Federal question suggested for the first time in a petition for a rehearing, after judgment in the highest court of a State, is not properly raised so as to authorize this court to review the decision of that court." To the same effect, exactly, is the case of *Butler* vs. *Gage*, 138 U. S., 52.

While the case of *Loeber* vs. *Schroeder*, 148 U. S., 580, held that after the case had been once appealed to the State court of Appeals and sent back to the lower court and there again decided, it was then too late to present a Federal question. There is surely no analogy in these cases to the one at the bar.

Nor are counsel any more fortunate in citing the recent case of *Kipley* vs. *Illinois*, 170 U. S., 182, for there the determination of the court denying the jurisdiction rests upon the fact that the motion to amend the answer was not placed upon the ground that a Federal question was thereby sought to be set up; and even, if such was the intention of counsel, the record did not show that the ruling of the court in denying the amendment was excepted to. Here the record shows that the motion was made *solely* on the ground of the denial of Federal rights and the denial of the motion was excepted to and the ground for the motion and the reason for the exception are set out both in the order of the court and the bill of exception. Record pp. 20–21.

THIRD. It is not contended by the counsel for the plaintiff in error, as counsel for defendants in error seem to think, that there can be any recovery here for damage done by closing the street, if the city was acting "within the scope of its powers," and exercising such powers in a constitutional way.

The gravamen of the plaintiff's case was that the council of the city in passing the ordinance had transcended its authority, and had undertaken to appropriate private property without due process of law, or compensation for those damaged.

We nave no complaint against the Virginia cases cited

by the learned counsel (*Smith* vs. *Alexandria, Kehrew* v. *Richmond* and *H. B. & C. Co.* vs. *Roanoke*), for they are in no wise in conflict with our contention, for in all of these cases, and many others of the like kind, the municipal corporation was held not liable, because, in the act complained of, the city was *improving the streets, not devoting them to the exclusive use of a private corporation as in this case, and thereby depriving the public of their use and by that act injuring in a special way the plaintiff.*

Nor do we challenge the proposition stated on page 17 of the brief. that "A municipal corporation, if the authorisy is given it by the Legislature, has a right to make any use of a street which it may see fit, and the damage will be *damnum absque injuria*, so far as the lot-owner is concerned, *provided no one of the rights peculiar to him as the owner of the lot is taken away.*" Our contention was and is that our client was within the saving of the proviso, for the injury described in his declaration is peculiar to him and that any enactment, ordinance or law that deprived him of his right, or of an opportunity to establish such right, is void because unconstitutional.

But we do challenge the proposition, also contended for, certainly in the narrow sense in which counsel applies it, that all damages, in order to be recognized as *special*, must be directly traceable to the deprivation of one of three things, viz: *light, air or access.*

A practical illustration reduces this narrow view to an absudity. Let it be thus illustrated: The planting of so harmless an obstruction as a sign post in the street by a private corporation under authority of the city, which encroached one inch in front of another's lot would be, it is admitted by opposing counsel, a ground for suit, because there would be special damage, but the erection of an impassable barrier across a street only one inch away from a person's line, whereby public travel along a street was diverted and store property isolated, would not occasion spe-

cial damage though the value of such person's lot was thereby practically destroyed.

We cannot accept so irrational and illogical a conclusion, or believe that this court will recognise it. The courts in England, where the proposition was once accepted, have long ago repudiated it. See cases cited in opening brief, pp. 17-18.

It is true that some of the ablest courts in this country have undertaken to draw a hard and fast line in order to determine this question, but others equally able have taken the other view. The cases favorable to our view are cited and commented upon in our opening brief, and we need not here repeat these citations.

This court has but recently held that in estimating damages in condemnation proceedings, "the *profitableness* of the business was undoubtedly a matter to be considered." *A. Bachus, Jr.*, vs. *Fort Street U. Depot Co.*, 169 U. S., 557, 574.

Is it not paradoxical to say that such damages as "profitableness" of a business conducted on a lot located near to property taken, may be considered in condemnation proceedings, and yet the "profitableness" of a business may be injured without redress, in cases where the legislative agencies have failed or refused to provide process or proceedings necessary to secure compensation?

On this precise point, we beg to call the attention of the court to the charge in the plaintiff's declaration. It is there alleged that "the plaintiff, his tenants, agents, servants, and all others, on foot, in carriages, wagons, and other vehicles, had free access and approach to said messuage and premises from the direction of Canal street and so back again at all times of the year at their will and pleasure, yet the said defendants, well knowing the premises, to-wit: on the day and year aforesaid, wrongfully and unjustly placed divers fences and other structures across the said highway known as Eighth street at a point, to-wit: two hundred and fifty-one feet south of Cary street and —

feet north of the face of the north wall of the old canal, which fences and other said structures obstructed and closed the said highway and prevented the plaintiff, his tenants, agents, servants, and others, from having the free use of said highway as he and they might otherwise have had, and by means of the premises the plaintiff has also from thence hitherto been deprived of the use of his said store and dwelling upon said messuage and of large gains, profits, benefits, and advantages in the way of rent which he might and otherwise would have acquired from the said stores and dwellings, to-wit: of the sum of fifteen hundred dollars, and by means whereof the value of said property has been and is greatly diminished to a great extent, to-wit: to the sum of two thousand dollars, and whereby the plaintiff has been and still is greatly annoyed and incommoded in the renting, use, and enjoyment of said messuage and premises, and has been and still is by means of the premises otherwise greatly injured and damnified."

FOURTH. In reply to the contention made by the learned counsel on the other side that the absence from the Virginia Constitution of the word "damaged" makes a world of difference in the determination of this case, we wish to remark (1) that the plaintiff in this honorable court is insisting on an infraction of his constitutional rights under the Federal Constitution and not under the State Constitution, and (2) that this court has settled once for all in the great case of *Pumpelley* vs. *Green Bay Company*, 13 Wall. 166, 179, *that the serious interruption to the common and necessary use of property is equivalent to the taking of it*, and that under the constitutional provisions it is not necessary that the land should be absolutely taken. In that case, great and far-reaching principles were discussed and settled by a great and broad-minded judge. It is a wonder that the learned counsel should have attempted to resurrect the argument buried, as it was, under the weighty words of one of the three greatest of the great de-

parted judges of this, the greatest of courts. Mr. Justice Miller thus consigned the argument to oblivion :

"The argument of the defendant is that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.

"It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators, and placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law instead of the government, and make it an authority for the invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

But grant that the city is "charged with the duty of closing streets," just as much as it is charged with the duty of "opening streets." Yet it will not be contended that it could legally pass an ordinance opening a street without providing process against, and compensation to the persons whose property would be taken. So it cannot close a street without like provision to protect persons whose property is taken in the constitutional sense, that is damage; for it is undoubtedly the law of the land, and specially of the State of Virginia, that "once a highway always a highway," and not even the Legislature can take away the right of access to and user of without compensation. Elliott on Roads and Streets, sec. 658; *Taylor's Case*, 29 Gratt., 793; *Bunting* vs *Danville*, 92 Va., 200.

Said the Court of Appeals of New York, discussing the property rights of persons in the highway: "Any law which destroys property, or its value, or takes away any of its essential attributes, deprives the owner of his property," *Lohr* vs. *Mt. Eler R. Co.*, 101 N. Y,, 286.

FIFTH. While it is true that we fell into error in describing the exact location of the lot of this plaintiff, yet it is equally true that this is but a test case, for there are three other suitors whose properties are likewise located on the same square—namely: James Marano, Dr. H. Wythe Davis and A. Meyer, and the facts are substantially the same in all of the cases and the principles are identical, so that this suggestion of counsel can have no bearing upon the case.

In conclusion, we wish to say that while the city ef Richmond is nominally the defendant to this suit, yet it cannot be seriously affected by its determination for the ordinance allowing the closing of the street and the building of the obstruction therein protects its interest by the following provision:

"Fourth. The said company, by exercising the privileges herein granted, doth hereby agree and bind themselves to indemnify and save harmless at all times the said city from any loss or damage suffered by reason of any one being injured in any manner in using said bridge or stairways, or by reason of the building or existence of the same, and shall pay to the city any amount or amounts recovered against said city by any judgment or judgments given on account of any such injnries." Record, p. 18.

Respectfully submitted,

HENRY R. POLLARD.